No. 1069

IN THE

Supreme Court of the United States

October Term, 1944.

E. I. duPONT deNEMOURS & COMPANY, - Petitioner,

versus

MINNIE L. WRIGHT, Administratrix of the Estate of WILLIAM T. WRIGHT, Deceased, - - - - - - - Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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March 19, 1945.

WESTERFIELD-SONTE CO., INCORPORATED, LOUISVILLE, KY.

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E. I. DUPONT DENEMOURS & COMPANY, - *Petitioner,*

v.

MINNIE L. WRIGHT, ADMINISTRATRIX OF THE ESTATE OF WILLIAM T. WRIGHT, DECEASED, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, E. I. duPont deNemours & Company, hereby petitions this Honorable Court for a writ of certiorari to be issued to review the judgment entered in the United States Circuit Court of Appeals for the Sixth Circuit on December 7, 1944 (petition for rehearing denied January 22, 1945 (R. 231); second petition for rehearing denied February 6, 1945 (R. 259)), in the above entitled cause.

OPINIONS BELOW.

The original opinion of the Circuit Court of Appeals, dated December 7, 1944, and not yet reported is printed at R. 223.[1] In response to a petition for rehearing (R. 205) which called the Court's attention to the fact that the Court had misunderstood the essential facts on which the Court had based its opinion, the Court rendered a second opinion in which it withdrew the facts on which it had based its first opinion, but nevertheless, overruled the petition for rehearing (R. 231). On account of this unique situation, a second petition for rehearing was filed (R. 233) on January 24, 1945, and overruled without opinion on February 6, 1945 (R. 259). The second opinion of the Circuit Court of Appeals is not yet reported and is printed at R. 256.[1]

The District Court rendered an opinion when it denied petitioner's motion for a directed verdict. This opinion is printed at R. 16.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended (43 Stat. 938, Sec. 1, 28 U. S. C. A., Sec. 347). The judgment of the Circuit Court of Appeals was entered on December 7, 1944 (R. 203). The first petition for rehearing was denied January 22, 1945 (R. 231). The second petition for rehearing was denied February 6, 1945 (R. 259), and this petition is filed within three months thereafter.

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[1]For ready reference a copy of both the first and second opinions of the court below are printed herewith as an appendix, page 31.

SUMMARY STATEMENT OF FACTS.

This is a suit by Minnie L. Wright, Administratrix of the Estate of her husband, William T. Wright, to recover damages on account of petitioner's alleged negligence which she claims was responsible for the death of her husband on June 5, 1942. She was awarded a verdict for $15,000.

Mr. Wright was in no way responsible for the accident which resulted in his death. He was employed by Jones-Dabney Company lacquer manufacturers, in Louisville, Kentucky, for more than 15 years. His death was the result of burns which he sustained while standing in an elevator in the basement of Jones-Dabney Company when a drum of nitro-cellulose, which had been manufactured and shipped by petitioner ignited. The drum ignited when Jones-Dabney Company negligently slid or skidded it down the rough concrete surface of a ramp with a drop of 3½ feet in 14½ feet. No other consignee or handler of nitro-cellulose, except Jones-Dabney Company, ever slid or skidded a drum or container of nitro-cellulose down a concrete ramp.

Nitro-cellulose is not, strictly speaking, an explosive, although it is highly inflammable. Under the law (18 U. S. C. A. 383) nitro-cellulose can be shipped only in containers that have been approved by the Bureau of Explosives which is under the jurisdiction of the Interstate Commerce Commission. Prior to 1930, the Bureau had approved a container known as I. C. C. 20-A which was a 14-gauge galvanized drum. These containers cost approximately $15.00 each and could be

used "hundreds of times—thousands of times" (R. 122). In 1930 the Bureau approved a container known as I. C. C. 17-E (R. 149) which was a lighter 18-gauge black-painted steel drum which could only be used one time. These drums cost approximately $4.00 each. Obviously it was more economical for a manufacturer to use the heavier container, which could be re-used thousands of times instead of the lighter container which could be used only once.

Nitro-cellulose is necessary in the manufacture of lacquer. Prior to 1939 Jones-Dabney Company had purchased nitro-cellulose from petitioner. Such shipments had been made in the heavier, returnable container or drum. During 1939, 1940, 1941 and for approximately six months of 1942, Jones-Dabney Company had purchased nitro-cellulose from one of the other two manufacturers of nitro-cellulose. Petitioner had used the lighter, non-returnable container—17-E—in domestic trade at times since at least 1937 (R. 123). There is no evidence that petitioner knew or had any reason to know what types of container had been received by Jones-Dabney Company during the three and a half years that it bought nitro-cellulose from others. At the trial in January, 1944, it developed that the other two manufacturers of nitro-cellulose, for reasons of economy, had used the heavier, returnable drums in domestic trade and the lighter, non-returnable drums or containers in shipments abroad and under lend-lease (R. 143, 145).

Although the law requires that all accidents and leakages and evidence of improper handling or im-

proper containers be reported to the Bureau of Explosives which is under the jurisdiction of the Interstate Commerce Commission, there had never been a claim since 1930 that any accident was caused by a failure of the lighter container (R. 147, 149, 151).

In the spring of 1942, Jones-Dabney Company, evidently being short of material, ordered by wire a car of nitro-cellulose from petitioner (R. 63). This shipment was made in the lighter container or drum, I. C. C. 17-E. The car containing the shipment was marked with four red and white placards, one on each end and one on each of the side doors of the car, with words in large red letters, "Dangerous," "Highly Inflammable," "Keep Lights and Fire Away." The placards also contained in large letters the injunction, "Handle Carefully." On each drum was pasted a sign reading "Nitro-Cellulose," "Caution, Do Not Use Near an Open Flame or Fire" (R. 51, 52, 224, 225).

From this point the court below stated the essential facts as follows (R. 223, 224):

> "* * * The shipment containing the destroyed drum, arrived at the Jones-Dabney plant by rail, in a sealed car. Upon arrival the drums were shunted to the ground upon a wooden slide with steel rails. The drum which failed was then pushed across a concrete pavement and *skidded down a concrete chute with a drop of 3½ feet in a length of 14½ feet.*"[2]

The court below then stated the cause of the accident as follows (R. 223, 224):

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[2]Italics ours throughout.

> "There is no dispute as to the physical causes of the accident. The experts agreed that the sliding of the steel drum *upon the rough concrete surface of the ramp,* caused a spark which ignited vapor released by a *loosening of the head of the drum on the way down the ramp.* * * *"

In other words, the court correctly found that the accident was caused by skidding or sliding a steel drum head first (R. 45) down the rough concrete surface of a ramp or chute with a drop of 3½ feet in a length of 14½ feet, and that this rough treatment was sufficient to

(1) loosen the head of the drum,
(2) permit vapors to be released, and
(3) generate a spark.

Under these facts the court below imposed liability on petitioner because:

> (a) The court was of the *erroneous* opinion that the drum in question was subjected by consignee, Jones-Dabney Company "to the customary handling of drums of nitro-cellulose by lacquer manufacturers in the Louisville district," and
>
> (b) that petitioner was negligent in failing to warn the consignee of the danger in so handling the lighter drum.

The following from the first opinion of the court below demonstrate that that court thought that skidding or sliding a container of nitro-cellulose down a

concrete ramp was customary and usual in the Louisville district:

(R. 226)

"* * * There was also evidence that it was safe to skid the galvanized drum on concrete and that such skidding was practical and necessary, and conformed to the *usual practice of all Louisville lacquer manufacturers.* The evidence justified an inference that the appellant knew, or should have known, that its consignee followed the *common practice of skidding the drums* at its plant, * * *.

"The usual test for determining casual (causal)[3] relation between some failure of duty and an injurious result which follows, is the foreseeability of injury by the alleged negligent actor. * * *"

"This test is satisfied, in the present case, by evidence of the *customary* handling of drums of nitro-cellulose by the Jones-Dabney Company and other *Louisville lacquer manufacturers,* * * *

"While there is proof that much nitro-cellulose had been shipped abroad in similar containers, there is no proof that shipment in such containers had been made to consignees accustomed to handling drums *in the manner prevalent among lacquer manufacturers in the Louisville district.*"

(R. 227)

"Our conclusion is that the danger inherent in subjecting the appellant's black containers to the *customary handling of drums of nitro-cellulose by lacquer manufacturers* in the Louisville district, * * *."

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[3]Parenthesis supplied.

> "The essential claim of negligence is based upon failure to warn the consignee of the danger in rough handling of the container after they were unloaded."

Obviously therefore, the court below imposed liability on petitioner because the court thought skidding or sliding a drum of nitro-cellulose down a concrete ramp and which the court had stated was the cause of the accident, was the usual, customary method of handling drums of nitro-cellulose in this district. If the court below had been correct in its assumption of facts, its conclusion would have been proper.

However, there was no evidence in the Record that any lacquer manufacturer or anyone else in the Louisville district or anywhere else, except the consignee, Jones-Dabney Company, ever skidded or slid a nitro-cellulose drum of any kind—either the old heavy galvanized iron or the lighter steel—down a concrete chute or ramp.

The court below was of the further erroneous opinion that the lighter drum in question had been approved by the Bureau of Explosives of the Interstate Commerce Commission only for use abroad under lend-lease. The original opinion stated (R. 224):

> "It (petitioner)[4] shipped the material in a standard form of container, generally used by manufacturers of nitro-cellulose for shipment to Europe under the lend-lease agreement, and *approved for that purpose* by the Bureau of Explosives of the Interstate Commerce Commission."

[4]Parenthesis supplied.

Of course, if the Interstate Commerce Commission had approved the lighter container for use abroad *only*, and petitioner had used it in domestic shipments in this country, petitioner would have been guilty of a violation of law and liability in this case could have been imposed on it for such a breach.

However, as was shown (R. 153) the Bureau of Explosives had approved the lighter container or drum for general use anywhere in this country or abroad.

From the above it is apparent that the court below held that petitioner should have foreseen that consignee, Jones-Dabney Company, would skid or slide the lighter drum or container down the rough surface of a concrete ramp and should have warned consignee against such use, because the court thought (a) that skidding or sliding a drum of nitro-cellulose down a rough concrete ramp was customary, and (b) that the lighter drum was approved *only* for use in shipments abroad.

A petition for rehearing was filed on December 27, 1944 (R. 205), which called the attention of the court below to the fact that

> (a) there was no evidence to support the court's conclusion that it was "the customary" or "usual practice" to slide or skid heavy or light drums of nitro-cellulose down a concrete ramp, and
>
> (b) no other person except consignee, Jones-Dabney Company, had ever slid or skidded a drum of nitro-cellulose down a concrete ramp, and

(c) that the lighter drum in question had been approved by the Interstate Commerce Commission for domestic as well as foreign use.

In response to this petition for rehearing, the court below delivered a second opinion (R. 256) in which the court *withdrew the erroneous statements* of facts on which it had imposed liability in the original opinion. The second opinion is, we believe, without parallel, and for ready reference is in part as follows (R. 256):

"PER CURIAM. Upon consideration of the petition for rehearing filed by the appellant in the above-entitled cause, and upon further review of the record, the court concludes that its observations in the opinion that there was a general practice among lacquer manufacturers in the Louisville district, to skid drums of nitro-cellulose over rough concrete, is not sufficiently supported by the evidence, and such observations are withdrawn. It is further the view of the court that any implication in the opinion that there was a general practice to skid such drums down a concrete ramp, is not to be derived from the language of the opinion, and if so, any intention to raise such implication is denied. The court also is of the view that the statement in the opinion that the lighter form of container was limited to use by manufacturers of nitro-cellulose for shipment to Europe under the lend-lease agreement, and approved but for that purpose by the Bureau of Explosives of the Interstate Commerce Commission, implies a limitation on their use not warranted by the evidence, and that the reference to the use of such containers should have been broad enough to validate their use for transportation in domestic commerce."

After thus (a) withdrawing from the original opinion the references, statements and implications that it was customary to skid drums of nitro-cellulose down a concrete ramp, and (b) enlarging the opinion so as to show that the Interstate Commerce Commission had approved the lighter drum or container for domestic use, the court below nevertheless adhered to its affirmance of the judgment of the District Court (R. 257).

This situation was called to the attention of the court below in a second petition for rehearing filed January 24, 1945 (R. 233), and denied without opinion February 6, 1945 (R. 259).

Since it was shown that no other consignee except Jones-Dabney Company ever slid or skidded either a heavy or light drum of nitro-cellulose down the rough concrete surface of a ramp, and since there is no evidence that petitioner knew or should have known that the Jones-Dabney Company was treating containers of nitro-cellulose in this unheard-of manner, it is submitted that the court below imposed on petitioner the responsibility of foreseeing a misuse such as no one ever heard of.

There is this further fact: Consignee, Jones-Dabney Company admitted that as soon as it saw the lighter drum in question, it knew that such drum was different from those to which it had been accustomed; knew that the new drum looked, felt and handled different, and that the consignee was "a little bit more cautious because of the new drums." Mr. Murphy, foreman of

Jones-Dabney lacquer department, and the man in charge of unloading the shipment in question, testified:

(R. 62)

"Q. Mr. Murphy, you say when this shipment of nitro-cellulose came in you immediately noticed it was in an entirely different type of drum to those which you had been accustomed to handling?

A. That's right.

Q. It looks different, doesn't it?

A. That's right.

Q. It feels different?

A. That's right.

Q. It handles different?

A. That's right.

Q. And I believe you were a little bit cautious because of the new drums, is that right?

A. That's right."

(R. 63)

"Q. One other question, Mr. Murphy. You have been in this business, I believe you said nineteen years?

A. In the paint and lacquer business, that's right.

Q. You are familiar with drums of both types?

A. Yes, sir.

Q. And you know that this is a lighter drum, the black drum is a lighter drum than the galvanized drum.

A. That's right.

Q. And you knew that immediately upon opening these cars when you saw these drums.

A. That's right."

Thus consignee knew in advance of the accident, every fact which a notice from petitioner could have given it. It knew that this shipment was in drums that (a) were lighter, (b) looked different, (c) felt different, (d) handled different from the heavier drums that it had previously used.

Even with present hindsight, what notice could petitioner have given the consignee that consignee did not know without notice? After realizing that this shipment was in lighter, etc., drums, the conduct of the consignee Jones-Dabney Company in negligently treating it as it had treated the heavier drums, is best explained by the following testimony of consignee that it was out of nitro-cellulose and was in a hurry to get this shipment unloaded:

(R. 62)

"Q. And I believe you were a little bit cautious because of the new drums, is that right?

A. That's right.

Q. And yet Jones-Dabney permitted the different drums to be handled in just exactly the same way they had handled the others, on iron skids and on concrete ramps. Is that right?

A. The way I can answer that is, I have got orders to unload the car and go ahead and use the material.

Mr. Willis: I believe that's all.

Redirect Examination by Mr. Conner.

Q. Why did you unload this particular drum after noticing it was a different character of drum?

A. We had to have the material. We were out of material at the time, and we bought I think, a carload from DuPont, I think through a wire from the buyer, and we had to have the cotton for the orders there standing."

Neither petitioner nor the railroad company could ship nitro-cellulose except in containers that had been approved by the Bureau of Explosives, which is under the jurisdiction of the Interstate Commerce Commission. The District Court declined to admit the Regulations or testimony regarding the Regulations of the Bureau of Explosives approving the lighter container, I. C. C. 17-E, before the jury (R. 152). The court below, while agreeing that such evidence might "have diluted the fault of the appellant (petitioner) in the minds of the jury," held that if this was error, it was not prejudicial (R. 28). This was clearly wrong. If petitioner had shipped nitro-cellulose in a container that had not been approved by the Bureau of Explosives, would not the plaintiff have been entitled to show that fact in a suit for damages? Conversely, petitioner should have been permitted to prove to the jury that the container in question had been approved for domestic use and the further fact that there had never been a claim that an accident was caused by the failure of the lighter container.

QUESTIONS PRESENTED.

1. Is a manufacturer of nitro-cellulose—a highly inflammable material—negligent in failing to foresee that an experienced consignee will misuse a container of nitro-cellulose in a way that no other person ever treated a container of nitro-cellulose?

   The decision of the court below on this question is in conflict with the decision of this Court in *Brady* v. *Southern Railway Company,* 320 U. S. 476.

   The decision of the court below is also in conflict with applicable decisions of the Kentucky Court of Appeals.

2. Is a manufacturer of nitro-cellulose negligent in failing to warn an experienced consignee of nitro-cellulose not to slide or skid a drum of nitro-cellulose down "the rough concrete surface of a ramp" "with a drop of 3½ feet in a length of 14½ feet" when no other handler of nitro-cellulose ever skidded or slid a drum of nitro-cellulose down a concrete ramp?

3. Is a manufacturer negligent in failing to notify a consignee of facts which the consignee admits it knew without such notice?

4. Is it negligence to ship nitro-cellulose in a container that had been approved by the Interstate Commerce Commission more than 10 years previously and where there had never been an accident attributable to the use of such container?

5. Where a party is sued for negligence in shipping nitro-cellulose in a certain container, is such party not entitled to introduce in evidence Regulations of the Interstate Commerce Commission approving the use of such container—such Regulations being issued pursuant to 18 U. S. C. A. 383?

   The decision of the court below on this question is in conflict with decisions of the Second and Third Circuit Courts of Appeal.

6. Is a manufacturer liable for shipping nitro-cellulose in a container approved by the Interstate Commerce Commission where there is no evidence that there was anything wrong with the nitro-cellulose or anything wrong with the container in which it was packed and where the accident was caused by the consignee sliding or skidding the container down the rough concrete surface of a ramp—a misuse of the container to which no other consignee ever subjected a container of nitro-cellulose?

REASONS FOR GRANTING THE WRIT.

1. In its first opinion the court below held the drum in question was "skidded down a concrete chute with a drop of 3½ feet in a length of 14½ feet" and that the cause of the accident was "the sliding of the steel drum upon the rough concrete surface of the ramp, caused a spark which ignited vapor released by a loosening of the head of the drum on the way down the ramp."

In its first opinion the court held the test of foreseeability "is satisfied in the present case by evidence

of the *customary* handling of drums of nitro-cellulose by the Jones-Dabney Company and *other Louisville* lacquer manufacturers," also "Our conclusion is that the danger inherent in subjecting the appellant's black containers *to the customary handling of drums of nitro-cellulose by lacquer manufacturers in the Louisville district* * * *."

In response to a petition for rehearing the court withdrew any statements, references or implications to the fact that any other person in the world except consignee, Jones-Dabney Company, had ever slid or skidded a drum of nitro-cellulose down a concrete ramp. Thus the court withdrew the facts on which it had based its first opinion but nevertheless let the decision stand, thereby imposing on petitioner the duty of foreseeing a misuse that no one else in the world ever practiced.

This decision of the Circuit Court of Appeals imposing on petitioner the legal duty of foreseeing a misuse of the container such as no one else in the world ever practiced, is in conflict with the decision of this Court in *Brady* v. *Southern Railway Company,* 320 U. S. 476, where this Court held that the cause of the particular accident "was so unusual, so contrary to the purpose of the derailer, that provision to guard against such a happening was beyond the requirement of due care. * * * Bare possibility is not sufficient. Evidence too remote to require reasonable provision need not be anticipated. * * * The carrier was not obliged to foresee and guard against the misuse of the derailer."

2. The decision of the Circuit Court of Appeals is in conflict with applicable decisions of the Court of Appeals of Kentucky that a party is only required to foresee that which is probable and not that which is possible.

3. In its first opinion the Circuit Court of Appeals stated that the use of the drum in question—I. C. C. 17-E, had been approved by the Bureau of Explosives of the Interstate Commerce Commission for use abroad *only*. The court held that it was not prejudicial for the District Court to have excluded the Rules and Regulations of the Bureau of Explosives. However in its second opinion the court admitted that the Bureau of Explosives had approved the use of the container in question for domestic as well as foreign use; nevertheless the court adhered to its original ruling as to the exclusion of this evidence.

4. The decision of the court below that the exclusion of the Rules and Regulations of the Bureau of Explosives was proper, is in conflict with decisions of the Second and Third Circuit Courts of Appeal.

5. The questions involved are important, not only to petitioner but to manufacturers generally, since the decision in this case imposes on manufacturers the duty of warning an experienced consignee not to do something that no one else ever did.

This is an important question of Federal law which has not been but should be settled by this Court.

CONCLUSION.

For the reasons herein set forth, it is respectfully submitted that the writ should be granted.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS BELOW.

Reference to the opinions of the Circuit Court of Appeals and of the District Court is made in the petition, page 2.

II.

JURISDICTION.

The statutory provisions under which the jurisdiction of this Court is invoked, is shown in the petition, page 2.

III.

STATEMENT OF THE CASE.

This appears in the petition, beginning at page 3.

IV.

SPECIFICATION OF ERRORS TO BE URGED.

Errors to be urged are those specified in the petition, pages 15 and 16 under the heading "Questions Presented."

V.

ARGUMENT.

Point I.

The decision of the court below that petitioner was required to foresee a misuse which no other handler of nitro-celuose ever practiced, is in conflict with the latest decision from this Court and in conflict with the decisions of the Kentucky Court of Appeals on this subject.

The court below correctly held that the cause of the accident was sliding a drum of nitro-cellulose down a concrete chute with a drop of 3½ feet in a length of 14½ feet. The opinion states:

> "The drum which failed was then pushed across a concrete pavement and *skidded down a concrete chute with a drop of 3½ feet in a length of 14½ feet.*
>
> "There is no dispute as to the physical causes of the accident. The experts agreed that *the sliding of the steel drum upon the rough concrete surface of the ramp,*[5] caused a spark which ignited vapor released by a loosening of the head of the drum on the way down the ramp."

The court below, being then of the opinion that this treatment of sliding or skidding drums of nitro-cellulose down concrete ramps or chutes, was customary in the Louisville district, held that petitioner should have foreseen such handling of the drum in question and

[5]Italics ours throughout.

was negligent in not warning consignee against such handling. For ready reference the court below said in its first opinion:

> "The usual test for determining casual (causal)[6] relation between some failure of duty and an injurious result which follows, is the foreseeability of injury by the alleged negligent actor. * * * This test is satisfied, in the present case, by evidence of the customary handling of drums of nitrocellulose by the Jones-Dabney Company and other Louisville lacquer manufacturers, * * *"
>
> "Our conclusion is that the danger inherent in subjecting the appellant's black containers to the customary handling of drums of nitro-cellulose by lacquer manufacturers in the Louisville district, including their liability to spark when skidded, was foreseeable by the appellant (petitioner),[6] and so a direct casual (causal)[6] relation existed between the failure to warn the consignee of such danger and the injury which followed, unbroken by any fault of the consginee in the handling because that, too, was foreseeable in the light of attendant circumstances."

A petition for rehearing was filed (R. 205) which called the court's attention to the fact that the court had misunderstood the facts and that there was no evidence that any lacquer manufacturer or anyone else in the Louisville District or elsewhere, except the consignee, Jones-Dabney Company, ever skidded a nitrocellulose drum of any kind—either steel or galvanized iron—down a concrete chute or ramp. In response to this petition for rehearing the court filed a second

[6]Parenthesis supplied.

opinion and withdrew its statements or implications that there was a general practice among lacquer manufacturers in the Louisville district to skid drums of nitro-cellulose over rough concrete or down concrete ramps (R. 256). The court, however overruled the petition for rehearing.

We therefore have a case where an accident was caused by a misuse on the part of consignee, Jones-Dabney Company, such as no other handler of nitro-cellulose ever practiced, coupled with the fact that such misuse was correctly held by the court below to be the cause of the accident.

The holding by the court below that petitioner should have foreseen that consignee, Jones-Dabney Company, would skid a drum of nitro-cellulose down a concrete ramp is in conflict with the latest decisions from this Court on the subject of proximate causes and foreseeability.

In *Brady, Admrx.*, v. *Southern Railway Company*, 320 U. S. 472, where a derailer was hit from the wrong direction and where it appears that this had frequently happened before, this Court held that the railroad company was not required to foresee such a misuse of the derailer. The Court said:

> (p. 483) "* * * There is no evidence of unsuitability of the rail for ordinary use."[7]
>
> (p. 483) "The Supreme Court of North Carolina was of the view that striking a derailer from the unexpected direction 'was so unusual, so con-

[7]There is no evidence in the instant case of the unsuitability of the container in question for the ordinary handling of such containers by everyone except consignee, Jones-Dabney Company.

trary to the purpose' of the derailer that provision to guard against such a happening was beyond the requirement of due care. With this we agree. Bare possibility is not sufficient. Milwaukee & St. Paul Ry. Co. v. Kellog, 94 U. S. 469, at 475:

" 'But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.'

"Events too remote to require reasonable provision need not be anticipated."

(p. 484) "* * * Here the rail was sufficient for ordinary use, and the carrier was not obliged to foresee and guard against misuse of the derailer, even though the misuse occurred as often as the evidence indicated. It was the wrongful use of the derailer that immediately occasioned the harm. * * *"

The decision of the court below is also in conflict with the decisions of the Court of Appeals of Kentucky—the highest state court—on the subject of foreseeability.

Watrals, Admr., v. *Appalachian Power Company*, 273 Ky. 25, 115 S. W. (2d) 372. In this case a child was killed while flying a kite, to which was attached a small copper wire, when the copper wire came in contact with the power line of the power company. The Kentucky Court of Appeals held that the company was not re-

quired to foresee such an unusual thing as a child flying a kite with a copper wire.

> (p. 30) "In the instant case, the wire, though only 13 feet above the ground, was beyond the reach of children playing in the road or on the ground beneath the wire. The distance of the wire above the ground bore no relation to the accident. The result, no doubt, would have been the same had the wire been 30, 50, or more feet above the ground. It was alleged in the petition that the appellees knew children played in the road and flew kites in the vicinity of the wire, but it was not alleged that these children flew kites with copper wires attached thereto. It is a matter of common knowledge that children ordinarily use strings, which are nonconductors or electricity, in flying kites, and no facts are alleged which would charge appellees with knowledge that a copper wire might be used. The act that caused the accident was an independent one of the Robinette boy, which *could not reasonably have been anticipated* by the appellants."

Merchants Ice & Cold Storage Company v. *United Produce Company,* 279 Ky. 519, 131 S. W. (2d) 469.

> (p. 525) "Men are not called upon to guard against every risk that they may conceive as possible, but only against what they can forecast as probable."

Since no one except consignee, Jones-Dabney Company, ever slid or skidded a drum—either heavy or light—of nitro-cellulose down the rough surface of a concrete ramp, petitioner could not possibly have an-

ticipated, and should not in law be required to foresee and warn against, such a happening.

Since the skidding or sliding of the drum down the concrete ramp was the cause of the accident, it was bound to be proximate cause of the accident and the court below erred in not directing a verdict for petitioner.

Point II.

A party is not required to give a consignee notice of facts which the consignee admits it knew without such notice.

This point is stated at pages 11, 12, 13 of the petition.

Point III.

In its first opinion the court below erroneously stated that the container in question had been approved by the Bureau of Explosives of the Interstate Commerce Commission *only* for foreign use and that it was not prejudicial error to exclude the Rules and Regulations of the Bureau of Explosives from the jury.

In response to a petition for rehearing the court below enlarged its original opinion so as to show that the Bureau of Explosives had approved the container in question for domestic as well as foreign use. However, the court still continued to hold that petitioner was not entitled to put the Rules and Regulations of the Bureau of Explosives before the jury.

Such a decision is in conflict with decisions of both the Second and Third Circuit Courts of Appeal.

In *Westchester Fire Insurance Company* v. *Buffalo Housewrecking and Salvage Co.,* 129 Fed. (2d) 319, the Second Circuit Court of Appeals made reference to Pamphlet No. 7 of the Bureau of Explosives and affirmed the same case reported in *40 Fed. Sup. 378* in which the District Court held:

> "* * * Upon the trial the libellant offered in evidence Pamphlet No. 7 issued by the Bureau of Explosives of the United States Government. Objection to its reception in evidence was made. Decision on the motion was then withheld. In my opinion, it was competent to be received, and the objection is overruled. 18 U. S. C. A., §383, Crim. Code, §233; Wigmore on Evidence, Third Edition, Vol. 6, p. 21; G. & C. Merriam Co. v. Syndicate Pub. Co., 2 Cir., 207 F. 515; Lehigh Valley R. Co. v. State of Russia, 2 Cir., 21 F. 2d 406; The Vestris, D. C., 60 F. 2d 273. * * *"

See also *Lehigh Valley R. Co.* v. *State of Russia,* 21 Fed. 2d 406, 2 C. C. A.

Fidelity & Deposit Co. of Maryland, et al., v. *Lehigh Valley R. Co.,* 275 Fed. 922, 3 C. C. A. In this case the Third Circuit Court of Appeals authorized the introduction of Rules and Regulations of the Interstate Commerce Commission.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

CHARLES W. MILNER,
ROBERT T. MCCRACKEN,
ABEL KLAW,
Attorneys for Petitioner.

APPENDIX.

ORIGINAL AND PER CURIAM OPINIONS.

No. 9818.

UNITED STATES CIRCUIT COURT OF APPEALS
SIXTH CIRCUIT.

E. I. DuPont De Nemours & Company, *Appellant*,
v.
Minnie L. Wright, Administratrix of the Estate of William T. Wright, Deceased, *Appellee*.

Appeal from the District Court of the United States for the Western District of Kentucky.

Decided December 7, 1944.

Before Simons, Allen, and McAllister, Circuit Judges.

Simons, Circuit Judge. The accident which caused the death of the appellee's decedent was the result of the rupture and subsequent ignition of a drum of nitro-cellulose manufactured by the appellant and shipped by it to the Jones-Dabney Company, a lacquer manufacturer, in Louisville, Kentucky. The decedent was an employee of the consignee, and the consignor appeals from a judgment for the decedent's administratrix on ground that it was not negligent and, in the alternative, if negligence was proved it was not the proximate cause of the death, the

chain of causation being broken by the independent intervening negligence of the consignee.

Nitro-cellulose is not, strictly speaking, an explosive, though it is highly inflammable. When wet it cannot be set off by concussion. The container here involved was moistened with a 30% solution of alcohol which, while it is sufficient to prevent detonation, increases the fire hazard. The shipment containing the destroyed drum, arrived at the Jones-Dabney plant by rail, in a sealed car. Upon arrival the drums were shunted to the ground upon a wooden slide with steel rails. The drum which failed was then pushed across a concrete pavement and skidded down a concrete chute with a drop of 3½ feet in a length of 14½ feet.

There is no dispute as to the physical causes of the accident. The experts agreed that the sliding of the steel drum upon the rough concrete surface of the ramp, caused a spark which ignited vapor released by a loosening of the head of the drum on the way down the ramp. The combustion was so violent that the drum was hurled 60 feet to where the decedent was in an elevator, and he received burns which shortly caused his death. Men on the ground outside the plant were knocked down, and a building some distance away was set on fire.

No question is raised as to the inherently dangerous character of nitro-cellulose, nor as to the obligation of the appellant to persons other than those in contractual relation with it, under the doctrine of *MacPherson* v. *Buick Co.*, 217 N. Y. 382, for lack of due care in its manufacture, packaging, and shipment. The appellant contends, however, that it was without fault in any respect. It shipped the material in a standard form of container, generally used by manufacturers of nitro-cellulose for shipment to Europe under the lend-lease agreement, and approved for that purpose by the Bureau of Explosives of the Interstate Commerce Commission. The car containing the shipment was marked with four red and white placards, one on each end and one on each of the side doors of the car, with words in large red letters, "Dangerous," "Highly Inflammable," "Keep Lights and Fire

Away." The placards also contained in large letters the injunction, "Handle Carefully." On each drum was pasted a sign reading "Nitro-Cellulose," "Caution, Do Not Use Near an Open Flame or Fire." The appellant also points out that there was no proof of any infirmity in the drum, nor proof that the nitro-cellulose was improperly manufactured or packed. It therefore urges that there was a total absence of proof of negligence.

On the other hand, the record discloses that the Jones-Dabney Company had been using nitro-cellulose in the manufacture of its lacquer ever since 1925, and had purchased a large part of its supply from the appellant, though none for a year or two before the accident. In previous purchases the nitro-cellulose had been shipped in 14-gauge galvanized drums which were always returned to the shipper and re-used hundreds or more of times; that previous shipments had always been handled, upon arrival, in the identical manner of the present shipment; that this shipment was contained in 18-gauge black painted steel drums which were to be used only once. The black drums had little more than half the weight of the galvanized drums, and being protected only by a coating of paint would generate a spark when slid over a rough surface. It is therefore the contention of the appellee that in addition to the customary warnings of the dangerous and highly inflammable character of the shipment, the consignee should have been given warning that the new drums were less sturdy than the old and that they could not be handled as roughly; that the failure of the appellant to give such warning constituted actionable negligence.

There was evidence from which the jury could have found that the black drum was not a standard container for nitro-cellulose in the domestic lacquer trade, several lacquer manufacturers testifying that they had never seen any but the heavy galvanized drums used for this purpose; that the black drum is less sturdy than the galvanized, and more likely to permit an escape of inflammable vapors. There was also evidence that it was safe to skid the galvanized drum on concrete and that such skidding was practical and necessary, and conformed to the usual prac-

tice of all Louisville lacquer manufacturers. The evidence justified an inference that the appellant knew, or should have known, that its consignee followed common practice of skidding the drums at its plant, and that the appellant knew that its consignee had never before received shipments of nitro-cellulose from it except in heavy galvanized iron drums. There was also evidence that the appellant was the only manufacturer of nitro-cellulose which used the lighter black drums in the domestic trade. The warning placards, while they apprised the consignee of the dangerous and highly inflammable character of nitro-cellulose when its vapors were exposed to flame, gave no notice to the consignee of the weaker character of the black drum, nor of its tendency to spark upon friction with hard rough surfaces. This, we think, raised an issue of fact for the jury with respect to negligence, and we find no error in the denial of a motion for directed verdict upon that ground.

The usual test for determining casual relation between some failure of duty and an injurious result which follows, is the foreseeability of injury by the alleged negligent actor. *Pease* v. *Sinclair Refining Co.*, 104 Fed. (2d) 183 (C. C. A. 2); *Standard Oil Co.* v. *Tierney*, 92 Ky. 367; *Snydor* v. *Arnold*, 122 Ky. 557; *Louisville Home Telephone Co.* v. *Gasper*, 123 Ky. 128. In *Johnson* v. *Kosmos Portland Cement Co.*, 64 Fed. (2d) 193, we had occasion to give painstaking study to the considerations upon which the doctrine of proximate cause rests, as its development stemmed from the leading case of *Milwaukee, etc. Ry.* v. *Kellogg*, 94 U. S. 469, 474. We arrived at the conclusion that while the fact that injury is the natural consequence of negligence, may not of itself be sufficient upon which to base liability, yet where the injury could reasonably have been foreseen in the light of attending circumstances liability follows, and it is not necessary that the alleged negligent actor should have foreseen the precise manner in which the injurious result was brought about, if a generally injurious result should have been foreseen as reasonably probable. This test is satisfied, in the present case, by evidence of the customary handling of drums of nitro-cellulose by the Jones-Dabney Company and other Louisville lacquer manufacturers, by the inability of the appellant's con-

tainers to withstand such handling, by knowledge, actual or constructive, of such weakness, and the danger inherent in usual unloading practices, and by the failure to warn the consignee against such handling in its first experience with the new type container.

The appellant's argument that drums of like character had not before caused injury, must be rejected. While there is proof that much nitro-cellulose had been shipped abroad in similar containers, there is no proof that shipment in such containers had before been made to consignees accustomed to handling drums in the manner prevalent among lacquer manufacturers in the Louisville district. As we said in *Johnson* v. *Kosmos*, supra, "It needs no illustration to demonstrate that danger may be present though injury has not yet occurred." See *Texas & P. Ry.* v. *Carlin*, 111 Fed. 777, 781 (C. C. A. 5). We thought the true rule to be that when the thing done produces immediate danger of injury and is a substantial factor in bringing it about, it is not necessary that the author of it should have had in mind the particular means by which the potential force he has created might be vitalized into injury. The cases cited supported the conclusion, as does the American Law Institute, Restatement of Torts, §435, and Shearman & Redfield on Negligence §39. Kentucky law is likewise in accord. *Kentucky Independent Oil Co.* v. *Schnitzler*, 208 Ky. 507; *Miles* v. *Southeastern Motor Truck Lines*, 295 Ky. 156; *Watson* v. *Kentucky & Ind. Bridge and R. Co.*, 137 Ky. 619; *Whiteman-McNamara Tobacco Co.* v. *Warren*, 23 Ky. L. R. 2120.

Our conclusion is that the danger inherent in subjecting the appellant's black containers to the customary handling of drums of nitro-cellulose by lacquer manufacturers in the Louisville district, including their liability to spark when skidded, was foreseeable by the appellant, and so a direct casual relation existed between the failure to warn the consignee of such danger and the injury which followed, unbroken by any fault of the consignee in the handling because that, too, was foreseeable in the light of attendant circumstances.

The court below refused to admit in evidence regulations of the Interstate Commerce Commission authoriz-

ing the use of the light steel drums for the transportation of explosives, and this is assigned as error warranting reversal of the judgment. It is difficult to perceive the materiality of this evidence since the charge of negligence is not based upon the use of containers inadequate for transporting nitro-cellulose. The essential claim of negligence is based upon failure to warn the consignee of the danger in rough handling of the containers after they were unloaded. True, it is, that the excluded evidence might, in some measure, have diluted the fault of the appellant in the minds of the jury, unless carefully confined by instructions that the safe character of the drums for purposes of transportation necessarily did not establish their safety in other aspects, and if the evidence had been admitted we may not presume that it would not have been so confined. There are cases which hold that Interstate Commerce rules are for the benefit of railroad employees and the public rather than for the protection of shipper and consignee, who know the contents of a shipment and whether danger is inherent in its transit. *Davis* v. *A. F. Gossett & Sons,* 118 S. E. (Ga.) 773, is illustrative of such cases. These aside, however, we are not persuaded that the exclusion of the regulations resulted in prejudice. The containers involved were repeatedly referred to in the evidence as I. C. C. 73-E. Whether or not the jury understood this reference to mean that they were authorized by the Interstate Commerce Commission, is unimportant since the testimony of Hunt, an inspector for the Bureau of Explosives of the Interstate Commerce Commission, made it quite clear that the container was authorized for purposes of transit as a single trip container. The regulations would have added nothing to this evidence, and if there was error in their exclusion, it was not prejudicial. Rule 61, Federal Rules of Civil Procedure.

Finally, the appellant complains that the jury should have been charged that if Wright's death resulted from one of two or more equally inferred causes, for one or more of which the defendant was not responsible, the verdict should have been for the defendant. *Stone* v. *Von Noy R. R. News Co.,* 153 Ky. 240; *E. I. Dupont De Nemours Powder Co.* v. *Duboise,* 236 Fed. 690. We have had many

occasions to apply the rule that evidence is not substantial to carry a plaintiff's burden of proof where the result is to submit to a jury a mere choice of probabilities. This but permits them to conjecture or guess at the manner of an accident or the presence of negligence. *Parker* v. *Gulf Refining Co.*, 80 Fed. (2d) 795; *Toledo etc. RR Co.* v. *Howe* 191 Fed. 776, 782; *Virginia & S. W. R. Co.* v. *Hawk*, 160 Fed. 348, 352; *Davlin* v. *Ford*, 20 Fed. (2d) 317. It has no present application since there is no disagreement as to the manner of the accident nor the absence of notice as to danger in subjecting the new drums to the customary handling of the earlier type. The issues as to whether this constituted negligence and was the proximate cause of the accident, were clearly submitted to the jury by instructions of the court, to which no objection was made.

The judgment below is affirmed.

No. 9818.

UNITED STATES CIRCUIT COURT OF APPEALS
SIXTH CIRCUIT

E. I. DuPont De Nemours & Company,
Appellant,
v.
Minnie L. Wright, Administratrix of the Estate of William T. Wright, Deceased,
Appellee.

On Petition for Rehearing.

Decided January 22, 1945.

Before Simons, Allen, and McAllister, Circuit Judges.

Per Curiam. Upon consideration of the petition for rehearing filed by the appellant in the above-entitled cause, and upon further review of the record, the court concludes that its observations in the opinion that there was a general practice among lacquer manufacturers in the Louisville district, to skid drums of nitro-cellulose over rough concrete, is not sufficiently supported by the evidence, and such observations are withdrawn. It is further the view of the court that any implication in the opinion that there was a general practice to skid such drums down a concrete ramp, is not to be derived from the language of the opinion, and if so, any intention to raise such implication is denied. The court also is of the view that the statement in the opinion that the lighter form of container was limited to use by manufacturers of nitro-cellulose for shipment to Europe

under the lend-lease agreement, and approved but for that purpose by the Bureau of Explosives of the Interstate Commerce Commission, implies a limitation on their use not warranted by the evidence, and that the reference to the use of such containers should have been broad enough to validate their use for transportation in domestic commerce.

Notwithstanding these amendments to the opinion we adhere to the view that when the appellant for the first time shipped nitro-cellulose to the Jones Dabney Company in the lighter form of container, its failure to notify its consignee that such containers could not be safely handled in the manner in which it was accustomed to handle the earlier galvanized drums, raised issues properly submitted to the jury as to whether such failure of notice constituted negligence, and whether, if so, such negligence was the proximate cause of the injury; WHEREFORE,

IT IS HEREBY ORDERED That the petition for rehearing is in all other respects

DENIED.

No. 1069

Supreme Court of the United States

October Term, 1944.

E. I. duPONT deNEMOURS & COMPANY, - Petitioner,

versus

MINNIE L. WRIGHT, Administratrix of the Estate of WILLIAM T. WRIGHT, Deceased, - - - - - - - Respondent.

BRIEF FOR RESPONDENT OPPOSING THE PETITION FOR A WRIT OF CERTIORARI.

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Louisville, Ky.,
Attorney for Respondent.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

SUBJECT INDEX.

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(3) The Circuit Court of Appeals did not hold the regulations of the Interstate Commerce Commission inadmissible where relevant; but only that they were not relevant to the issue in this case, and even if relevant, they were merely cumulative evidence of facts otherwise fully proven and their exclusion was not prejudicial 23-25

(4) Since the Circuit Court of Appeals did not intimate that the regulations would not be admissible where relevant to the issues involved, there is no conflict between it and any other circuit on that subject 25

(5) The issues involved are of no consequence to anyone but the widow, to whom the monetary recovery is a partial substitute for the destruction of her husband's earning capacity. A case more inappropriate for review by this Court on certiorari is hard to imagine. A decision by this Court could and would settle nothing but this case 25-26

TABLE OF CASES.

*Not yet officially reported.

IN THE

Supreme Court of the United States

October Term, 1944.

No. _____.

E. I. DUPONT DENEMOURS & COMPANY, - *Petitioner,*

v.

MINNIE L. WRIGHT, ADMINISTRATRIX OF THE ESTATE OF WILLIAM T. WRIGHT, DECEASED, - - - - - - - *Respondent.*

BRIEF FOR RESPONDENT OPPOSING THE PETITION FOR A WRIT OF CERTIORARI.

The Respondent opposes the petition for a writ of certiorari for two reasons:

(1) The case involves only the question of whether, *under the law of Kentucky,* the evidence of Petitioner's negligence was sufficient to justify the submission of the case to the jury.

That is not a proper question for review by this Court on certiorari. A decision of that question by this Court would settle nothing but this case; and it would be wrong to deny a review to any litigant disappointed by a circuit court of appeals decision if

Petitioner were granted review in this simple negligence case.

(2) The decisions of the courts below were right, as is evidenced by the opinion of the District Court (R. 18), and of the Circuit Court of Appeals for the Sixth Circuit (R. 249), 146 F. 2d 765.

THIS IS NOT AN APPROPRIATE CASE FOR REVIEW BY CERTIORARI.

Rarely, we suppose, has this Court been burdened with a petition for a writ of certiorari in a case so inappropriate for the exercise of its discretionary jurisdiction. No Federal question is involved. There is no pretense that there is any conflict in the decisions of circuit courts of appeal in their interpretation of the negligence law of Kentucky. Certainly there is no pretense that anything but the negligence law of Kentucky could be involved. The decision of this Court could not produce uniformity of decision on any question.

Under *Erie* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, it is recognized that there will be no uniformity in the decisions of the State courts on negligence law; and that conflict amongst circuits in interpreting State law do not justify review on certiorari. The language of this Court in *Ruhlin* v. *New York Life Insurance Co.,* 304 U. S. 202, 82 L. Ed. 1290, is apposite:

> "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict

may be merely corollary to a permissible difference of opinion in the state courts."

The petition herein complains, as the Petitioner complained both to the District Court and to the Circuit Court of Appeals, both originally and on successive petitions for rehearing:

(1) That the evidence was not sufficient to justify the submission to the jury of the question of Petitioner's negligence, or if that contention be not sustained, then that the evidence demonstrated that the alleged intervening negligence of Jones-Dabney Company, the employer of Respondent's decedent, broke the chain of causation and absolved Petitioner from responsibility for the ensuing death.

(2) That the trial court erred in excluding evidence concerning regulations of the Interstate Commerce Commission. The evidence was excluded not because such regulations are inadmissible if relevant, but because *such evidence lacked relevancy to the issues involved in this case.* Furthermore, as the Circuit Court of Appeals clearly pointed out, *the facts sought to be elicited were actually brought before the jury* and if there were error in excluding the regulations it was non-prejudicial (R. 254). The evidence rejected was, at most, cumulative.

We repeat, that it must be rare that a case is presented to this Court that is so inappropriate for the exercise of this Court's discretionary jurisdiction.

Having been heard only some six times in the courts below, counsel want to be heard again, as if on appeal, in this Court on the same matters.

Magnum Import Co. v. *De Spoturno Coty,* 262 U. S. 159, 67 L. Ed. 922:

> ". . . The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes; first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. *The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing.* Our experience shows that 80 percent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ. . . "

Obviously, Petitioner belongs to the 80 per cent group.

COMMENTS ON PETITIONER'S SUMMARY STATEMENT OF FACTS.

The facts are simple and may be best comprehended from reading the opinion of the District Court (R. 18) and of the Circuit Court of Appeals (R. 249), 146 F. 2d 765.

Lest a somewhat distorted view of the facts be obtained from the petition for certiorari, we submit the following comments on the statements contained in the petition, and supplement that statement in certain respects.

The petition for certiorari, as did the briefs and successive petitions for rehearing below, states, with

somewhat wearisome repetition, that no other lacquer manufacturer ever slid a drum of nitro-cellulose down a concrete ramp or chute. Technically the statement is accurate but, as will presently appear, the fact is of no significance since many other lacquer manufacturers skidded drums of nitro-cellulose about concrete floors, and no witness testifies that the danger of skidding on an inclined surface differs particularly from the dangers of skidding on a flat surface.

It is erroneously stated (p. 3) that the order in question was placed by wire. While it is of no significance, the fact is that the regular printed and typewritten order form was used (R. 195), and the supposed emergency which counsel mention as justifying the use of the dangerous drum that caused the death, in fact had no existence.

It is argued (p. 7) that when the Court withdrew from its original opinion the statement that it was the "general" practice of lacquer manufacturers in Louisville to skid drums over rough concrete; and the "implication," if any, that it was the "general practice" to skid such drums down a rough concrete ramp; and the "implication" that the Interstate Commerce regulations permitted the use of the black iron drum only in the export trade, no basis was left for the conclusion that the duPont Company could have anticipated an accident from the use of these drums. The Circuit Court of Appeals answered that contention (R. 257):

> "Notwithstanding these amendments to the opinion we adhere to the view that when the appellant for the first time shipped nitro-cellulose to the

> Jones Dabney Company in the lighter form of container, its failure to notify its consignee that such containers could not be safely handled in the manner in which it was accustomed to handle the earlier galvanized drums, raised issues properly submitted to the jury as to whether such failure of notice constituted negligence, and whether, if so, such negligence was the proximate cause of the injury; . . ."

It is clear, we think, that the Court withdrew those observations in somewhat broader terms than was required by the facts. Doubtless it was moved to that action by the fact that the withdrawal, in whatever terms, left its decision unimpaired. Possibly it felt that so broad a concession about an immaterial matter might bring the case to an end and avoid further insistence by Petitioner on minutiae and precision of expression that are more characteristic of a description of metes and bounds in a deed than of proceedings in a jury trial. If the Court had any such thought in mind its purpose failed.

The handling of this particular drum conformed to the practice which witnesses stated was usual and customary in lacquer manufacturing plants in Louisville and elsewhere; that the skidding of drums of nitro-cellulose over concrete is essential in the operation of lacquer plants, and that the practice in this particular instance did not vary from that followed in plants generally; though it is true that other lacquer manufacturers testified it was not customary in their plants to skid drums of nitro-cellulose over concrete

and so the word "all" in the Court's opinion was inadvertent and was withdrawn. The following conclusions, however, are amply supported by the testimony:

(1) No nitro-cellulose had ever been delivered in the sort of drum used in this case to any one in Louisville prior to the shipment in question. Witnesses for both sides agree to this: Murphy (R. 46), Burnett (R. 69), Kleier (R. 76-77), Evans (R. 83), Mitchell (R. 89), Milletti (R. 161), and Janssen (R. 163).

(2) No such drum had ever been used for the delivery of nitro-cellulose to any consignee in the United States, except the duPont Company made such use, though it does not appear to whom such deliveries were made. Nor did any witness from any single lacquer manufacturing company in the whole United States testify it had ever received such a drum (Callahan, R. 145; Crum, R. 142).

(3) That the light-weight drum was more susceptible to rupture than the standard drum, its top and fittings were less substantial and well made, and it would spark, while the galvanized drum would not (R. 47-100-105).

(4) There was competent and persuasive testimony that in the operation of lacquer plants drums of nitro-cellulose are customarily, though not invariably, skidded out of cars on metal rails and are customarily skidded about concrete floors in the plants. Various employees of the Jones-Dabney Company's plant testified that such practice prevailed in their plant for 19 years and in such other plants as they had had occasion to visit, and that it is not practicable to operate a

lacquer plant without skidding these drums about the concrete (R. 47, 48, 66, 80, 84, 90).

Mr. Burnett, a graduate chemist (R. 67), who has worked for lacquer manufacturers in Toledo and Buffalo and who has worked in various capacities for the Reliance Varnish Company in Louisville, Kentucky, in which plant he has had charge of lacquer manufacturing, in response to a question about the use of the black iron drum for the shipment of nitrocellulose, said (R. 69): "I have never seen it shipped in that type of drum."

He testified that he had been in numbers of other lacquer manufacturing plants, in addition to the three in which he had worked and had this to say concerning the practice of skidding drums (page 70 of the Record):

> "Q. Mr. Burnett, state whether or not in the operation of a lacquer plant, in the usual and customary way such plants are operated, drums of nitro-cellulose are customarily skidded about concrete floors.
>
> A. *They have been—always have been in any of the plants I have been in.*
>
> Q. In your opinion, is it practical or feasible to do otherwise?
>
> A. *In my opinion, I do not see how it is possible to do otherwise.*"

R., p. 72:

> "Q. And you mean to say, Mr. Burnett, that in all three of those plants, it is the common custom to skid steel drums full of nitro-cellulose down concrete ramps?

A. No, I didn't say that. I said—I answered his question that I had seen them skidded across concrete, not down concrete ramps but concrete floors. *I have seen them skidded across concrete floors day in and day out. I didn't say a concrete ramp.* I don't know whether there is any particular difference or not.

Q. Are you talking now about skidding end first or rolling?

A. I am talking about just giving a shove right across the floor, like that.

Q. *Do you mean to say that was common practice in these businesses?*

A. *Yes, that's common practice at our plant.*

Q. *Today?*

A. *Yes.*

Q. Why do you skid rather than roll them?

A. Well, when they unload these drums, either before or after, if the drum is standing fairly close to the chute where they unload it, I mean where they empty the contents of the drum, they will just give it a shove over there. If it is any distance, they will roll it.

Q. You are familiar with the fact that steel brought in violent contact with concrete or other steel, or any such hard substance, is apt to give off sparks, isn't it?

A. Yes.

Q. Don't you consider it rather dangerous procedure to skid drums of this rather highly inflammable material on concrete so as to subject it to the danger of sparks?

A. We didn't consider it so, no.

Q. Well, it is, as a matter of fact, isn't it?

A. You are talking about steel drums or galvanized?

Q. These drums.

The Court: The witness hasn't had any experience with but one type, has he?

Mr. Conner: No.

A. We never considered it dangerous to skid those across concrete. We may have been wrong. We never considered it dangerous, skidding galvanized drums across concrete."

R., p. 74:

"Q. I am simply asking you if from your experience with the companies for whom you worked whether it is perfectly safe and careful procedure to slide a drum full—a steel or galvanized or painted iron drum full of highly inflammable liquid like nitro-cellulose down a rough concrete ramp such as that shown in the picture which I hand you.

A. Right or wrong, we have always gone on the assumption that it was a safe practice with a galvanized drum. I certainly would object to doing it with a steel drum, that is, from what experience I have had.

Q. I believe I understood you to say awhile ago you never slid them down concrete ramps. You slid them for short distances on level surfaces.

A. We don't happen to have a concrete ramp ourselves.

Q. In your opinion then, would it or not be a safe and careful procedure to slide drums of either character, galvanized or painted, down a rough concrete ramp full of highly inflammable material like nitro-cellulose?

A. Well, in my opinion, I believe it would be fairly safe practice to slide a galvanized drum

down there. I may be wrong in it, but from what experience we have had it would indicate to me that it would be fairly safe to slide a galvanized drum down a concrete ramp, even though it is filled with inflammable liquid, as long as it is not full of explosives—as long as—you are speaking of nitro-cellulose?"

UNDER THE LAW OF KENTUCKY THE QUESTION OF PROXIMATE CAUSE WAS FOR THE JURY.

It seems clear from the above evidence that there is no difference between skidding a drum over a concrete floor, a flat concrete surface, and skidding it over a concrete chute, an inclined concrete surface. At any rate, there is no evidence that there is any such difference, and we assume it not to be a function of this Court to draw an inference to the contrary. That is the jury's function. The fact is, of course, that the drum which Petitioner substituted for the standard drum in this instance, after many years of use of the standard drum, involves vastly increased hazards, since it is susceptible to leaks and to spark, neither of which occurs with the standard drum. These increased hazards required notice of the change and it is frivolous to argue that Petitioner could not be responsible unless it knew of or anticipated the exact hazards that the use of this flimsy drum involved in this particular case.

It is argued that Jones-Dabney Company saw the drums were different and nevertheless used them. From this it is contended that notice of the increased hazards

would have been ineffectual. Again we submit that this Court is asked to draw inferences which it is the function of the jury to draw.

The facts are that, having no notice of the drastic departure from the practice invariably followed by duPont Company and all other manufacturers in shipping nitro-cellulose to Louisville, no executive or person expert in such matters was sent to inspect this particular car. The foreman of the crew of workmen who started unloading these drums saw that they were different from any he had ever handled before, but he knew that duPont "handled very highly explosive materials of all types"; and he assumed that duPont knew that "it was all right to send it in those kind of drums" (R. 63).

Will this Court assume that had duPont given proper notice of its intended use of the inferior drums, Jones-Dabney would not have taken required precautions? Surely that is a question for the jury. Surely, also, the negligence of this crew of workmen, if it was negligence, was not so unexpected a development that duPont Company might not reasonably have foreseen such negligence. It will be borne in mind that the testimony above quoted shows that the customary handling by Jones-Dabney of the standard drums was a safe practice and it only became dangerous because of the substitution of the inferior drum (R. 74-75). For nineteen years standard drums were skidded down this very chute without incident. The very first flimsy drum that was sent down exploded (R. 48). The necessity of answering this argument in this Court em-

phasizes anew the utter inappropriateness of a review by this Court of the fact situation in such an ordinary negligence case.

The law is well settled in Kentucky that it is for the jury to say, under such circumstances, whether the negligence of the original actor is the proximate cause of the injury, even though there was intervening negligence of a third party.

Miles v. *Southeastern Motor Truck Lines, Inc.*, 173 S. W. 2d 990, 295 Ky. 156, Oct. 5, 1943.

Plaintiff's truck was caused to collide with defendant's automobile, by reason of defendant's negligence. Gasoline was spilled on the road and a fire was caused by "the act of the unknown smoker in carelessly throwing his lighted tobacco or match on the highway."

The Court held that the jury was justified in finding that the original negligence causing the collision was defendant's negligence; that the act of the unknown smoker was an intervening cause; but not a superseding cause, and defendant was liable.

> " 'The lighting of the match by Duerr having resulted in the explosion, the question is, was that act merely a contributing cause, or the efficient and, therefore, proximate cause of appellant's injuries? *The question of proximate cause is a question for the jury.* In holding that Duerr in lighting or throwing the match acted maliciously or with intent to cause the explosion, the trial court invaded the province of the jury. There was, it is true, evidence tending to prove that the

act was wanton or malicious, but also evidence conducing to prove that it was inadvertently *or negligently done by Duerr.* It was therefore for the jury and not the court to determine from all the evidence whether the lighting of the match was done by Duerr inadvertently or negligently, or whether it was a wanton and malicious act. As said in Milwaukee (& St. P.) R. Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256; "The *true rule is that what is the proximate cause of the injury is ordinarily a question for the jury. It is not a question of science or legal knowledge.* It is to be determined as a fact in view of the circumstances of fact attending it." ' Snydor v. Arnold, 122 Ky. 557, 92 S. W. 289, 28 Ky. Law Rep. (1250), 1252. . . ."

Continuing its discussion on the same subject, the Court said:

". . . In Thompson on Negligence, No. 161, it is said: 'On principle, the rule must be here, as *in other cases, that, before the judge can take the question away from the jury and determine it himself, the facts must not only be undisputed, but the inference to be drawn from those facts must be such that fairminded men ought not to differ about them.* It must be concluded that this is so, when it is considered that proximate cause is a cause which would probably, according to the experience of mankind, lead to the event which happened, and that remote cause is a cause which would not, according to such experience, lead to such an event. *Now, whether a given cause will probably lead to a given result is plainly to be determined by the average experience of mankind;*

that is, by a jury rather than by a legal scholar on the bench.' . . ."

Later in its opinion, we find this language:

"It is also a principle well settled that when an injury is caused by two causes concurring to produce the result, for one of which the defendant is responsible, and not for the other, the defendant cannot escape responsibility. One is liable for an injury caused by the concurring negligence of himself and another to the same extent as for one caused entirely by his own negligence.' Black's Law & Practice, No. 21; Thompson on Negligence, Nos. 47-52; Whitaker's Smith on Negligence, 27; 29 Cyc. 488-502."

Of course, it is true that the exact act of the third person, Jones-Dabney Company, and the exact nature of the occurrence that did take place need not have been foreseen or foreseeable. The Court, in the Miles case, put it thus:

". . . 'The mere fact that the concurrent cause or intervening act was unforeseen will not relieve the defendant guilty of the primary negligence from liability, but if the intervening agency is something so unexpected or extraordinary as that he could not or ought not to have anticipated it, he will not be liable, and certainly he is not bound to anticipate the criminal acts of others by which damage is inflicted and hence is not liable therefor. 29 Cyc. 501-512 Sofield v. Sommers, 22 Fed. Cas., page 769, No. 13,157, 9 Ben. 526; Andrews v. Kinsel, 114 Ga. 390, 40 S. E. 300, 88 Am. St. Rep. 25.' "

Kentucky Independent Oil Company v. *Schnitzler*, 208 Ky. 507, 271 S. W. 570, involved the liability of an oil company to the consumer of oil who had purchased same from a merchant, who had in turn purchased the oil from the oil company. Both the oil company and the merchant were made parties defendant, and it was alleged that the oil company was negligent in permitting gasoline to be in the oil and that the merchant knew about it and was negligent in selling the oil with that knowledge. Nevertheless the Court of Appeals said:

> "As above stated, liability in a case of this character does not rest in contract or deceit, in which state of case, as we have seen, the knowledge of the middleman of the defect releases the manufacturer from liability to the ultimate consumer. Liability here rests on the duty owed by the manufacturer to the class of persons likely to be injured by his failure to exercise ordinary care in his activities, where danger to them will probably result from such failure.
>
> "(3) *Hence the negligence or knowledge of Burnside can have no effect to absolve appellant from liability to the ultimate consumer,* except in so far as such negligence or knowledge breaks the chain of causation, if it does. The problem thus presented for solution is the old problem of proximate cause in actions of tort."

Later in that opinion is this language:

> "(4) That the appellant set in motion forces which ultimately resulted in damage to appellee's decedent of a kind that the law will notice and

give redress for must be conceded. Does the fact that a second human actor, not acting in concert with a first human actor, intervenes with a tortious act which begins later in time to a tortious act of the first actor, and which second tortious act is the only force in active motion at the time of the damage, exonerate the first actor from liability? Although the second human actor may be liable, it does not necessarily follow that the first is exonerated. By the decided weight of authority, the first will be liable, if he foresaw or ought to have foreseen the commission of the second's tort. Although the earlier view was that the prior tort-feasor was never liable where a later tort-feasor intervened (see Vicars v. Wilcocks, 8 East. 1 (1806)), yet it has gradually come to be admitted that the earlier tort-feasor is liable in cases where the commission of the subsequent unlawful or tortious act and the happening of the damages ought to have been foreseen by him as not unlikely to follow" . .

And the subject is concluded thus:

"(6,7) Hence the court did not err in overruling appellant's demurrer to appellee's petition; and, as Burnside's ignorance or knowledge of the presence of the mixture and his negligent act in its resale, if it was negligent, were absolutely immaterial so far as appellant's liability in this case is concerned, it follows that the allegation in the petition of Burnside's negligence in the resale of the mixture was an immaterial allegation and hence surplusage, which neither adds nor detracts anything from the pleading . . ."

The District Court dealt with the same matter (R. 22), and the Circuit Court of Appeals (R. 252) thus correctly stated the principle:

> ". . . We arrived at the conclusion that while the fact that injury is the natural consequence of negligence, may not of itself be sufficient upon which to base liability, yet where the injury could reasonably have been foreseen in the light of attending circumstances liability follows, *and it is not necessary that the alleged negligent actor should have foreseen the precise manner in which the injurious result was brought about, if a generally injurious result should have been foreseen as reasonably probable.* . .
>
> ". . . We thought the true rule to be that when the thing done produces immediate danger of injury *and is a substantial factor in bringing it about, it is not necessary that the author of it should have had in mind the particular means by which the potential force he has created might be vitalized into injury.* The cases cited supported the conclusion, as does the American Law Institute, Restatement of Torts, Sec. 435, and Shearman & Redfield on Negligence, Sec. 39. Kentucky law is likewise in accord. *Kentucky Independent Oil Co.* v. *Schnitzler,* 208 Ky. 507; *Miles* v. *Southeastern Motor Truck Lines,* 295 Ky. 156; *Watson* v. *Kentucky & Ind. Bridge and R. Co.,* 137 Ky. 619; *Whiteman-McNamara Tobacco Co.* v. *Warren,* 23 Ky. L. R. 2120."

THE ALLEGED "REASONS FOR GRANTING THE WRIT" ARE NOT SUFFICIENT.

On page 16 of the petition for certiorari the Petitioner undertakes to state the reasons why the Court should grant the writ. Curiously enough, we do not find a reference to Rule 38, which outlines the circumstances under which this Court will ordinarily grant a writ of certiorari.

We have already noted that the case wholly lacks any of the criteria referred to in that rule, or in any of the decided cases with which we have any familiarity.

An analysis of the alleged "reasons for granting the writ" will quickly demonstrate that there are no such reasons.

(1) Reference is made to *Brady* v. *Southern Railway Co.*, 320 U. S. 476. It is said that the standards of foreseeability laid down in that case were not met in this case. We submit:

(a) That the case at bar is ruled by the law of Kentucky, and if it were true that the facts in this case did not meet the requirements of the rule, as laid down in that case, that would furnish no ground for a review on certiorari, or even for a reversal on the merits if the case were properly here. The *Brady* case involved a suit under the Federal Employers Liability Act, and from that opinion we quote the following significant sentences:

> ". . . In Employers' Liability Cases, this question must be determined by this Court finally.

> Through the supremacy clause of the Constitution, Art. VI, we are charged with assuring the act's authority in state courts. *Only by a uniform federal rule as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states.* . . .
>
> ". . . But when a state's jury system requires the court to determine the sufficiency of the evidence to support a *finding of a federal right to recover, the correctness of its ruling is a federal question.* . .
>
> ". . . An examination of the proven facts to determine whether they are sufficient to permit a verdict by the jury for the decedent's estate based upon reason is of no doctrinal importance. Every case varies."

The language is particularly apt here. Petitioner argues with much vigor and repetition that no such accident as occurred in this case had ever occurred before; and we submit that that was due to the fact that no such container had ever been shipped to any Louisville lacquer manufacturer, or to a lacquer manufacturer elsewhere, by any other nitro-cellulose manufacturer except duPont.

What would be established by a decision of this Court adverse to Respondent? This Court is not prepared, we assume, to require the Kentucky courts to adopt different rules of negligence law. If attempted, the task could not be accomplished because "every case varies." What was said in the *Ruhlin* case, *supra*, page 2, to the effect that conflicts between circuits furnish no basis for certiorari when the matter is con-

trolled by State law is equally applicable here. Since "every case varies," nothing that this Court could say as to the formula that the Kentucky courts should follow in negligence cases could possibly control the next case that arises in Kentucky wherein the facts would necessarily be different.

(b) If it were necessary that the Court of Appeals of Kentucky apply the same principles of negligence law that this Court applies, there would be no occasion to review the case at bar, since the facts in the *Brady* case are so widely divergent from the facts in the case at bar that nothing therein stated or decided could have the slightest bearing on the determination of this case. In fact, there is no conflict between the principles of negligence law applied by this Court and those applied by the Kentucky courts.

That case involved a switching accident where some unknown person improperly set a derailer, and this Court found "it is mere speculation as to whether that negligence is chargeable to the decedent or another."

If the *Brady* case, a five to four decision of this Court, were thought to have even remote applicability to this case, we submit that a later unanimous opinion of this Court, *Tiller* v. *Atlantic Coast Line R. Co.*, 89 L. Ed. 403,* involves principles more nearly analogous. This also was a suit to recover from a railroad for negligently causing the death of an employee. As in this case, failure to give warning of a new or unusual practice was involved. In holding that the question was for the jury, this Court said:

*Not yet officially reported.

> ". . . The Circuit Court of Appeals held that there was substantial testimony to support a finding that the movement was an unusual one. Nevertheless, because no railroad rule or custom prohibited such an unusual movement, because some of the evidence showed that the same movement had been performed on other occasions, and because Tiller was familiar with the local situation, the Circuit Court of Appeals held that the railroad owed no duty to warn him of such an unusual movement. *We cannot say that a jury could not reasonably find negligence from the evidence which showed such an unprecedented departure from the usual custom and practice in backing cars, without giving 'adequate warning of the movement.'*"

The evidence here was persuasive that the change from the standard container to the flimsy container involved hazards not presented in the use of the standard container; that the handling customarily, though not universally, accorded containers of nitro-cellulose in lacquer plants was entirely safe with the standard container and unsafe with the substituted container.

The curious insistence, lacking any force, save such as is gathered from Petitioner's constant repetition thereof, that Petitioner could not have anticipated the use of a concrete chute, because other people did not have such a chute, has been sufficiently disposed of.

The danger that gas would escape from this flimsy drum and that the drum would come in contact with some other hard substance that would produce a spark, because of the absence of the zinc covering, was

sufficient to charge Petitioner with responsibility for the ensuing calamity.

(2) In an attempt to give some semblance of support to the contention that this is a proper case for review on certiorari, it is stated, somewhat feebly, that the decision of the Circuit Court of Appeals is in conflict with applicable decisions of the Court of Appeals of Kentucky, reliance, of course, being had on so much of Rule 38-(5)-(b) as authorizes a review on certiorari "where a Circuit Court of Appeals . . . has decided an important question of local law in a way probably in conflict with applicable local decisions."

There is no "important question" of local law involved. As this Court stated in the *Brady* case, "every case varies."

The Kentucky decisions referred to in Petitioner's brief (p. 25), with reference to foreseeability, announce no principle in conflict with the pronouncement of the Circuit Court of Appeals in this case (R. 252); nor of the Kentucky cases quoted *supra,* pp. 13-17.

A decision in this case certainly could not control the application of the principle of foreseeability as an element of negligence in the next case that may arise wherein a different factual situation is presented.

The second reason why the writ should issue in this case is, if possible, more flimsy than the first.

(3) It is said that the Court erred in excluding evidence as to the regulations of the Interstate Commerce Commission. Surely this Court is not prepared to review every case tried in a district court where one litigant contends that the trial court erred in the ex-

clusion or reception of evidence. The Circuit Court of Appeals did not hold that such regulations are not admissible in evidence *where relevant to the issues involved.* It merely held:

(a) That the evidence was not relevant to the issues in this case, and

(b) That if it were relevant the fact was amply proven and the error, if any, was not, therefore, prejudicial (R. 253):

> "The court below refused to admit in evidence regulations of the Interstate Commerce Commission authorizing the use of the light steel drums for the transportation of explosives, and this is assigned as error warranting reversal of the judgment. *It is difficult to perceive the materiality of this evidence since the charge of negligence is not based upon the use of containers inadequate for transporting nitro-cellulose.* The essential claim of negligence is based upon failure to warn the consignee of the danger in rough handling of the containers after they were unloaded. True, it is, that the excluded evidence might, in some measure, have diluted the fault of the appellant in the minds of the jury, unless carefully confined by instructions that the safe character of the drums for purposes of transportation necessarily did not establish their safety in other aspects, and if the evidence had been admitted we may not presume that it would not have been so confined. There are cases which hold that Interstate Commerce rules are for the benefit of railroad employees and the public rather than for the protection of shipper and consignee, who know the contents of a shipment and whether danger is inherent in its transit.

Davis v. A. F. Gossett & Sons, 118 S. E. (Ga.) 773, is illustrative of such cases. These aside, however, *we are not persuaded that the exclusion of the regulations resulted in prejudice.* The containers involved were repeatedly referred to in the evidence as I. C. C. 73-E. Whether or not the jury understood this reference to mean that they were authorized by the Interstate Commerce Commission, is unimportant since the testimony of Hunt, an inspector for the Bureau of Explosives of the Interstate Commerce Commission, made it quite clear that the container was authorized for purposes of transit as a single trip container. *The regulations would have added nothing to this evidence, and if there was error in their exclusion, it was not prejudicial.* Rule 61, Federal Rules of Civil Procedure."

(4) The fourth alleged reason why this is a proper case for review on certiorari is that other circuit courts of appeal have held the regulations in question to be admissible in evidence. The Circuit Court of Appeals in this case did not intimate that the regulations would not be admissible if relevant to the issue on trial. The cases relied upon by Petitioner involved losses in shipments where the regulations had been violated. Here the accident occurred after the shipment had terminated and the regulations had ceased to be applicable. However that may be, Petitioner got the full benefit of proving this regulation.

(5) It is urged that the questions involved are important to Petitioner and to manufacturers generally. We submit that the question in issue in this case is important only to the Respondent widow, to whom

$15,000 will mean a great deal as a partial substitute for the earning capacity of her husband which was destroyed. The case announces no general principle not already familiar. A case involving principles of less consequence to the general administration of the law, or a decision in which would be less likely to cut a pattern that would be controlling in other cases, can scarcely be imagined.

As we have observed before, the curious persistence of Petitioner, with its reiterated petitions for rehearing and for certiorari in this simple accident case, are explainable only on the ground that the Petitioner has a long purse and counsel who never tire. There is no other excuse for burdening this Court with this character of litigation.

We respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

J. VERSER CONNER,
Attorney for Respondent.

Emphasis throughout supplied.

(20)

No. 1069.

Supreme Court of the United States

October Term, 1944.

E. I. duPONT deNEMOURS & COMPANY, - Petitioner,

versus

MINNIE L. WRIGHT, Administratrix of the Estate of WILLIAM T. WRIGHT, Deceased, - - - - - - - Respondent.

PETITIONER'S REPLY BRIEF.

CHARLES W. MILNER,
ROBERT T. McCRACKEN,
ABEL KLAW,
Attorneys for Petitioner.

March 30, 1945.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

Supreme Court of the United States

October Term, 1944.

No. 1069.

E. I. DUPONT DENEMOURS & COMPANY, - *Petitioner,*

v.

MINNIE L. WRIGHT, ADMINISTRATRIX OF THE ESTATE OF WILLIAM T. WRIGHT, DECEASED, - - - - - - - - - *Respondent.*

PETITIONER'S REPLY BRIEF.

In the interest of accuracy attention is called to the following in respondent's brief:

I.

At page 6 it is stated:

> "The handling of this particular drum conformed to the practice which witnesses stated was usual and customary in lacquer manufacturing plants in Louisville and elsewhere; * * *"

This statement is contrary to the Record.

As stated by the court below:

> "* * * The drum which failed was then pushed across a concrete pavement and skidded down a concrete chute with a drop of 3½ feet in a length of 14½ feet."

Respondent can point to no evidence that anyone in the world, except consignee Jones-Dabney Company, ever skidded any kind of a drum of nitro-cellulose down a concrete ramp. And as correctly found by the court below, it was this unusual, unheard of act—the skidding of the drum down a concrete ramp—that caused the accident in question.

> "* * * The experts agreed that the sliding of the steel drum upon the rough concrete surface of the ramp, caused a spark which ignited vapor released by a loosening of the head of the drum on the way down the ramp. * * *"

There is no evidence in the Record that petitioner knew or suspected, or had any reason to know or suspect, that the consignee was guilty of such a practice.

II.

At page 6 it is stated:

> "* * * the skidding of drums of nitro-cellulose over concrete is essential in the operation of lacquer plants, and that the practice in this particular instance did not vary from that followed in plants generally; * * *"

The above is an overstatement. It is neither essential nor the general practice in the operation of lacquer plants, to skid drums of nitro-cellulose over concrete floors. There are five such plants in Louisville. Three of the five never permit drums of nitro-cellulose to be skidded on concrete floors (R. 77, 161, 163).

III.

At page 11 it is stated that there is no difference between skidding a drum over a concrete floor, a flat concrete surface, and skidding it down an inclined concrete surface.

There is the difference between day and night.

When a drum is skidded on a factory concrete floor there is nothing to loosen the removable top or head of the drum. The drum in question was skidded down the concrete ramp head first (R. 45) and as correctly found by the court below, and copied on page 2 above, the accident in question was caused by the head of the drum becoming loose on its way down the rough concrete surface of the ramp.

There is no evidence that the drum in question would have ignited if merely skidded on a level concrete floor instead of head first down a rough concrete ramp.

IV.

Each of the cases from the Kentucky Court of Appeals cited in respondent's brief bear out our contention that the decision of the court below was in conflict with applicable decisions of the highest State court. In each of them there is a prerequisite of "primary negligence" on the part of the defendant (petitioner) on account of "failure to exercise ordinary care" and a failure to foresee "something it ought to have foreseen."

Petitioner was guilty of no primary or other negligence in shipping the nitro-cellulose in a container that had been approved for that purpose by the Interstate Commerce Commission and that had never failed in twelve years of use, and it was not guilty of negligence in failing to foresee that a drum of nitro-cellulose would be skidded down the rough concrete surface of a ramp.

WHEREFORE it is respectfully submitted that the writ should be granted.

Respectfully submitted,

CHARLES W. MILNER,
ROBERT T. MCCRACKEN,
ABEL KLAW,
Attorneys for Petitioner.